Office Supreme Court, U.S.
FILED
OCT 14 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 305

WRIGHT CONTRACTING COMPANY, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

REPLY TO THE MEMORANDUM FOR THE RESPONDENT

SCOTT P. CRAMPTON
RICHARD S. DOYLE
Washington, D. C.
Attorneys for Petitioner

J. Q. DAVIDSON
TOM B. SLADE
Columbus, Georgia
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Reply to the Memorandum for the Respondent	1
Conclusion	4

Table of Cases

American Can Co., 37 T.C. 498, reversed, 317 F. 2d 604	3, 4
Consolidated Hamilton Dry Plate and Film Co. v. Commissioner, 317 F. 2d 829	2
Marquardt Corporation, 39 T.C. No. 42	3, 4
United States v. Harmon, 205 F. 2d 919	2

Miscellaneous

Rev. Rul. 63-182, Int. Rev. Bull. 1963-35, 6	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 305

WRIGHT CONTRACTING COMPANY, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

REPLY TO THE MEMORANDUM FOR THE RESPONDENT

In opposing the petition for a writ of certiorari the Government argues that the accrual here involved was not erroneous (Memo. 3). It is somewhat surprising, however, that no mention is made of the many cases in which the Supreme Court has held that an item of income does not accrue until the taxpayer has a "right" to it (Pet. 10). The Internal Revenue Service just recently issued a ruling to the same effect. Revenue Ruling 63-182, Int. Rev. Bull. 1963-35, 6. In the instant case, the taxpayer had no right to the withheld retainage until the work was completed and accepted and the contracting officer released the amount. These essential conditions were not met until a subsequent year in each instance (R. 40-41).

The Memorandum asserts at page 3 and again at page 6 that there is no conflict of decision involved, but discussed only two of the many cases cited in the petition which support not only the existence of the conflict, but the extent thereof (Pet. 10-11).

The Government suggests that the decision in *United States* v. *Harmon* should be limited to a holding that the taxpayer's method of accounting in that case was "permissible" (Memo. 3-4). It is submitted, however, that a fair reading of that decision places it on all fours with the case at bar in holding that the retainage could not be considered to be an item of income so long as unexercised discretion with regard to it remained in a third party.

The only other case discussed by the Government is that of *Consolidated-Hammer Dry Plate and Film Co.* (Memo. 4) which it contends is inapposite for two reasons: first, that the partial payment was discretionary, and, second, that the Government acquired title upon the making of the partial payment. It seems to petitioner that its case *parallels* the *Consolidated* case on both scores. The contracting officer in each case is to make the progress payments (317 F. 2d 830; R. 39, ¶ 7(b)) and the government in each case acquires "title" after the payments are made (Memo. 4; R. 40, ¶ 7(e)). The pertinent contract provisions are obviously quite comparable, since both are Government contracts.

In concluding its brief the Government suggests that there is no other reason for review and implies that the question is not in any event a current problem. This completely overlooks the fact that the Government itself has just recently filed a petition for review

by the Ninth Circuit in the case involving the *Marquardt Corporation*, 39 T.C. No. 42 (Pet. 10). In that proceeding the Tax Court expressly stated that it would not follow the holding in the present proceeding but would henceforth adopt the contrary view expressed by it in *American Can Co.*, 37 T.C. 198, reversed, 317 F. 2d 604.

The implication in the Government's Memorandum also overlooks the pendency of the *American Can Co.* case. On September 27, 1963, that taxpayer filed with this Court an application for an extension of time within which to file a petition for certiorari. In that application the first question is said to be as follows (Application, p. 2):

> * * * whether Petitioner, which kept its books of account and filed its income tax returns under an accrual method of accounting, could deduct in 1953 vacation pay and property taxes of four states that accrued in that year *although in prior years Petitioner had incorrectly deducted vacation pay and property taxes of such states in the year in which the items were paid.* (Italics supplied.)

The application was granted by Mr. Justice Harlan on October 1, 1963.

The petitioner submits that the conflicting, almost contemporaneous views of the Tax Court, the clear disagreement among the circuit courts (Pet. 11), the Government's appeal of the *Marquardt* case, and the application filed with this Court by the *American Can Co.* indicate clearly that the present problem is becoming increasingly important both to taxpayers and to the Government. It needs the authoritative guidance of an opinion by this tribunal. There is no rea-

son to believe that it will be settled short of a decision by this Court.

The serious nature of the controversy, affecting as it does taxpayers and the Government alike, merits something more than the cavalier treatment accorded it in the six-page Memorandum for the respondent.

CONCLUSION

The lower courts are in serious conflict on the issues raised by the petition for certiorari, the problem is a recurring one, and the petition for certiorari should be granted to resolve the conflict and prevent further litigation.

Respectfully submitted.

SCOTT P. CRAMPTON
RICHARD S. DOYLE
Washington, D. C.
Attorneys for Petitioner

J. Q. DAVIDSON
TOM B. SLADE
Columbus, Georgia
Of Counsel